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ABSTRACT

This document covers the copyright law in order to give schools, colleges, and public libraries the information they need to use video technology. The first section contains frequently asked questions about copyright law. The second section covers developing copyright guidelines. A sample permission letter for off-air videotaping is given to serve as a guide to educators and librarians for securing permissions from copyright owners. The final section is an analysis of the copyright law including background; rights of copyright owners; definition of public performance; fair use; off-air recording guidelines; face-to-face exemption; television rights; and a conclusion. (JLB)

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A VIEWER'S GUIDE TO

COPYRIGHT LAW:

WHAT EVERY SCHOOL, COLLEGE AND PUBLIC LIBRARY SHOULD KNOW

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Questions AND Answers

The following questions frequently arise during a session on copyright.

Q: If a school librarian is a certified teacher, does her presence in the library mean that a performance of a video in the library falls automatically within section 110(1)?

A: No. The librarian cannot be said to be teaching when principally performing the duties of librarian. Teaching within the meaning and intent of this section cannot be a passive matter.

Q: Can a school or library make a copy of a film or video for archival purposes when the program is no longer available?

A: No. Archival copying by a school or library of an audiovisual work, if done without permission, is illegal. Although the copyright law does permit some archival copying of print materials, audiovisual works are specifically excluded from this privilege. Even though a program may be unavailable, the copyright owner may have some plans for it in the future. In any event, the copyright owner during the term of copyright always retains the right to control duplication.

Q: Are the off-air taping guidelines applicable to public libraries?

A: Yes. Even though the guidelines do not specifically mention libraries, such was intended. However, all conditions of the guidelines must be satisfied, especially the requirement that the request for taping originate with a teacher. Libraries, like their school counterparts, will have to establish their own rules in order to regulate off-air taping.

Q: What are the penalties for copyright infringement?

A: The statutory damages range from $250.00 up to $10,000.00 per infringement. This means that a court can assess damages for each and every illegal act. In addition, the court may assess attorney fees of the plaintiff to the defendant if the court feels it is warranted. A plaintiff may elect to sue for actual damages in which case it must prove how much it lost in revenue as a result of the illegal acts of the defendant. As you might imagine, statutory damages would probably be preferred by a plaintiff in litigation against an educational institution.

Q: Can more than one off-air copy be made of a program under the guidelines?

A: In a system where more than one teacher requests that a copy be made, the answer is yes. Appropriate controls are essential in such cases in order to assure that all copies are accounted for and erased upon the expiration of the 45 day period unless a license is negotiated with the copyright owner. It may be easier to have teachers share a single copy if possible.

Q: What is the BOCES case?

A: In 1977 three educational film companies sued the Board of Cooperative Educational Services in Buffalo, N. Y. (BOCES) for illegally taping their copyright works off-air. The three plaintiffs were Encyclopedia Britannica Educational Corp., Learning Corporation of America and Time-Life Films. Although the plaintiffs attempted to negotiate a license, the defendant refused. The allegations covered not only duplication off-air, but also additional instances of duplication which BOCES performed for individual schools served by it, as well as illegal public performances of the duplicated works in classrooms. The litigation drew national attention because it was the first time an educational authority had been sued over this set of facts. The final damages assessed against BOCES were around $75,000 in addition to its own attorney's fees of nearly $250,000. Although the off-air guidelines were not considered by the court, one must bear in mind that there were no guidelines at all until just prior to the final decision of the court which was released in 1982. However, the judge did not rule out the applicability of fair use in other cases.

Q: Is it fair use to copy a portion of a video program to put into a school video production which will not be sold?

A: If the requirements of fair use are satisfied, the answer would be yes. The fact that the school production will not be sold does make the fair use requirements easier to comply with, but that fact does not make it automatically a fair use. When in doubt, requesting permission is advisable.

Q: If permission is requested for any reason, and no response is received from the copyright owner or its agent, can an assumption be drawn that consent has been given?

A: No. Inferred consent is not a valid argument in your favor, and your only alternative is to continue to request the permission required.

Q: If a film or video program lacks a copyright notice, can you assume it is in the public domain and thus not protected by copyright?

A: The law does allow a copyright owner to correct the omission of the notice, if certain requirements are met. On the other hand, you may have one of the few copies which lack the notice. The law does not require you to research the records of the copyright office, and if you relied in good faith on the omission of the notice, you would most likely be considered an innocent infringer. A word of caution...if you are planning to make a major use of a program lacking a notice, such as transmitting it, your potential exposure must be measured against the cost of researching the records of the Copyright Office. Claiming to be an innocent infringer has its limitations.

Q: Why is there such a wide disparity between the price charged by home video distributors and educational distributors for the same program?

A: The answer to this question goes to the very heart of the basic differences between the two markets. The home video market is part of the mass market where the potential volume of business is vast and sometimes limitless. Although the owners of mass market programs are in a position to charge a good deal of money to the distributor, the distributor can afford to sell or rent the program at a very reasonable price because of the economies of volume. When a typical program is released in the home video market, the distributor can realistically anticipate sales and rentals in the tens of thousands of units. On the other hand, the educational or non-theatrical marketplace made up principally of schools, colleges and libraries has a much smaller potential.

The educational distributor is faced with a much smaller potential market and thus must place a price on its products accordingly. The economies of volume are not as available to it. However, educational distributors include in their price the cost of full public performance rights, an additional benefit not available from home video stores.

Q: Are programs broadcast by public television and later made available to schools on prerecorded videocassettes covered by copyright, even though some public funds are used to provide the costs of production?

A: Most of the programs which are broadcast on public television are licensed to public television by the copyright owner who is often the producer. A typical program or series which appears on public television is underwritten by the private sector, very often a corporation or a number of organizations. Generally, the underwriter does not "own" the program and often it is owned by an individual public television station. The station then may assign distribution rights to a distributor which in turn will generate royalty income on behalf of the station. The station then uses this income to produce more programs and for other purposes which partially reduces its reliance upon individual donations or public funds. However, in some rare instances, public television may acquire such rights which enable it to grant schools, libraries and colleges the right to tape off-air without the payment of a license fee or to acquire a prerecorded videocassette directly from PBS. Conceptually, there should be no problem with protection under the copyright law in this instance.

Q: If a school or college installs a satellite dish to receive satellite transmissions, what kind of a license is required from copyright owners of the programs?

A: The answer to this question applies to any school system or library which utilizes a satellite dish to receive programming. The principle point is that a public performance license is required if the program is used in such a way as to constitute a public performance. This will be true even in those instances when no copy of the transmission is made. Although the Communication Act of 1984 made it possible for individuals to receive a satellite broadcast for private use, it did not exempt public performances. It should be noted that the 1984 act did not exempt private performances if the owner of the signal scrambles it and thus in such instances a license will be required.

The legal point being made here can also be extended to situations involving other locations where the use of a transmission involves a public performance.

Q: Under the off-air taping guidelines, can anything which you are capable of receiving on your television set be recorded?

A: No. The guidelines specifically limit themselves to "broadcast" programming which is defined as television programs transmitted by television stations for reception by the general public without charge. The only cablecasts which are allowed to be taped under the guidelines are simultaneous retransmissions. The premium channels and pay-per-view programming fall outside of the scope of the guidelines, and thus any taping you do with regard to such would be illegal unless specific permission is obtained in advance.

Q: Is there any limitation imposed by the guidelines in terms of where an off-air copy may be used?

A: Yes. Off-air recordings which are made under the authority of the guidelines are to be used only in classrooms and similar places devoted to instruction in the course of relevant teaching activities. This rules out extra-curricular activities or entertainment purposes. The guidelines also state that the use is to be restricted to a single building, cluster or campus. Beyond this, it is anticipated that teachers in other locations would initiate their own requests for an off-air copy.

DEVELOPING COPYRIGHT GUIDELINES

A recent trend in the educational community is the development of copyright guidelines by school districts and by individual institutions. This is occurring more frequently because most educational authorities want to avoid potential litigation. Most educators and librarians want to obey copyright laws as much as any other body of laws with which they must deal on a daily basis. Perhaps one of the things which distinguishes the copyright law from other laws is that the law itself is not easily understandable. Also, the opportunity for abuse exists on the part of everyone involved in the educational process, from the classroom teacher all the way up to the superintendent and governing board. An infringement will cause a copyright owner to bring suit against even those indirectly involved, including supervisors, administrators, and governing boards. On top of this, copyright infringement actions are expensive to defend and legal costs can easily run three to four times the amount of damages assessed by the court, as was the case in the Erie BOCES action. To avoid this, more and more school districts are attempting to write copyright policies for their own particular needs. Some of the policies may be more strict than the law requires, but in the final analysis, a policy becomes something which a particular system or institution desires for one reason or another.

This section will direct itself only to the essential features that become part of any copyright policy. It is not our intent to write a policy for you but rather to begin the thought process which may enable you to proceed.

Before beginning to develop the actual wording, you should obtain the approval of your governing authorities so that the policy you develop will have their total support and endorsement. They may well want to approve the final language, but you will want to meet with them from the beginning so that you are assured of their support throughout the development of your guidelines.

The next advisable step is to hold copyright meetings with your staff in order to determine their needs and also to determine how much they may or may not know about the subject. Bringing in outside experts is probably a good idea, especially for the purpose of exploring the law. You also may want to retain the services of an expert in the field to write the actual policy.

You will also have to decide whether your policy will be limited to a certain area, such as media, or if it will encompass all copyrighted works, including text and other print materials, software and the like. If you do include print materials, be sure to involve your librarians in the development process because the copyright law treats print materials differently than audiovisual works in some important respects.

A copyright policy should contain the following:

- sole rights of copyright owners;
- basic information related to the information contained in a copyright notice;
- A discussion of fair use, including some examples;
- a complete discussion of the off-air taping guidelines and a reprint of the entire guidelines;
- a complete discussion of the intent and limitations of the face-to-face teaching exemption. You may also want to discuss this exemption with your staff and recommend that any use of uncleared videotapes must first receive the permission of a specified individual.

You will want to have a discussion of whether or not a school will indemnify an employee who violates any of the announced policy in the event litigation occurs. Caution should be exercised in this regard because teacher contracts may disallow this procedure. Therefore, you ought to consult your school attorney for advice. A statement of professional standards and conduct is necessary, especially since copyright laws are easy to violate and not easy to monitor.

If you intend to include print materials, you will need a discussion of Section 108 which grants to certain libraries under certain conditions the right to make archival copies of print material. Section 108 also describes inter-library loans, neither of which pertain to audiovisual materials.

Although the task of developing a meaningful copyright policy is a formidable one, you and your staff will reap many rewards. It should take most of the guess work out of your dealings in this area. Once you have completed writing the guidelines and have conducted in-service training on them with your staff, you should find that monitoring the use of film and video in your schools is a much easier task.

SAMPLE PERMISSION LETTER FOR OFF-AIR VIDEOTAPING

The following sample permissions letter will serve as a guide to educators and librarians for securing permissions from copyright owners and their agents to make off-air recordings of television programs and to retain and publicly perform those recordings beyond the period of time allowed by the off-air taping guidelines. In order for a legally binding contract to exist, both the user and the copyright holder or its agent must agree to the terms and conditions. It is not sufficient that the party requesting the permission be the sole party even if it is stated in the letter that the other party will be bound if no response is received within a specified period of time, or that the request can be granted automatically without a response. In either case, at best, there exist a unilateral agreement, which is no agreement at all. All permissions should be requested in writing. The request should insist upon a written response.

REQUEST FOR PERMISSION TO OFF-AIR DUPLICATE

XYZ Film Co.
Main Street
Centerville, USA

We hereby request permission from your organization to make a recording of the television program entitled _____ to be broadcast in our area on _____,19__. We will require a license to allow us to retain the off-air copy for ____years from the date of recording. The license we require will permit our school (or library) to use the program for any public performance within our institution.

Please indicate your consent to this request by filling in the spaces provided below and returning this letter to us.

Sincerely yours,

Centerville School District

Producer-Distributor Reply:

Permission is hereby granted to you in accordance with the above request under the following terms and conditions. In addition the license fee shall be as follows:

Signed:

_____ _____
Copyright Holder or Agent Date

THE COPYRIGHT LAW: A MORE DETAILED ANALYSIS

The purpose of this section is to provide you with certain basic information related to the provisions of the copyright law applicable to the educational use of copyrighted works, including certain privileges given to educational and library users.

This section will provide you with a more detailed analysis of relevant provisions of the copyright law than was possible to do in the accompanying video presentation and for the most part will stand on its own as well. It is not intended to be a legal treatise, and it is presumed that most of the readers are non-lawyers. Therefore, legal citations and other references will be kept to a minimum.

All references to the copyright law unless otherwise noted are to the law presently in effect. This law was enacted by Congress in 1976 and signed by President Gerald Ford on October 19, 1976. It became effective January 1, 1978 and is cited as Public Law 94-553. It superseded the prior law which was in effect from 1909 until the effective date of the present statute.

BACKGROUND

Powers assumed by Congress in passing the copyright law stem from Article I, Section 8, of the United States Constitution which states in part: "The Congress shall have Power...to promote the progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries." The present law makes it clear that all other rights falling within the scope of copyright are to be governed exclusively by federal statute. Although any claim of copyright infringement or any other rights that existed under a variety of individual state copyright statutes in effect before January 1, 1978 were not eliminated, any cause of action arising after January 1, 1978 must be governed exclusively by the federal statute.

In the late 1950's, Congress was advised by the Library of Congress that a thorough study of the then copyright laws should be undertaken to determine the need for revision. At that time money was appropriated for such a study which culminated in the general revision enacted in 1976. It is important to note that the educational use of copyrighted works in places such as

classrooms and libraries received a good deal of attention and was a significant reason for the delay in final passage.

The purpose of copyright protection is to afford authors, film and video producers and other creators of intellectual properties the right to determine when and how their respective works are to be used. Most lose sight of the fact that when a person acquires possession of a film or video program (or similar creative work) that person only has custody of the property of the author, or in other words, the underlying work. For example, when you purchase a video program, you actually own nothing more than the case and the tape itself, but not the creative work embodied in that tape. The copyright law makes certain requirements on both the copyright holder and the user of the work.

A final thought - the copyright law represents a decent compromise between the interest of copyright owners on the one hand and users of copyrighted works on the other. As is the case with most laws in the United States, every interest group could not end up being fully satisfied with the final result, but every group left its mark on the language of the statute. It is now the task of each and every one of us to understand the law and, to the best of our collective ability, apply it honestly and correctly. The goal of this manual and the copyright video is to assist you in doing this.

RIGHTS OF COPYRIGHT OWNERS

The copyright law grants to the owner of a copyright certain rights and privileges. This is at the heart of the basic theory behind the copyright - that it provide an incentive system to prospective authors or producers which results in the grant of certain exclusive rights during the term of copyright. After this time, the creative work becomes dedicated to the public and enters into public domain. Without the assurance that their works would be their exclusive property, few, if any, individuals or corporations would devote their energies to writing, filmmaking, or to any of the creative acts we rely upon for knowledge and entertainment. The following rights are granted to the copyrighted owner:

> to reproduce the copyrighted work in copies
> to prepare derivative works based upon the copyrighted work
> to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending
> in the case of motion pictures (and other types of works) to perform the copyrighted work publicly

It is essential to explain further what these rights mean as a full understanding of them is critical. The first right, the right to make copies, probably needs no elaboration. The copyright owner usually grants this right to a distributor or publisher who deals with the owner on a contractual basis. The second right, to prepare derivative works, means the right to adapt, translate,abridge, or revise the original work. An anthology is often regarded as constituting a derivative work. The third right, to distribute copies to the public, is reasonably clear on its face although one point is appropriate here. In those cases where a copyright owner or its agent sells a work outright, the sole right to distribute is lost. That is not to say that the distributor can enter into commercial distribution and compete with the copyright with the copyright owner, but it does mean that the distributor can rent or loan the work without permission of the copyright owner and without any obligation to pay royalties. This is known as the "first sale doctrine". Because of the impact of the "first sale doctrine" many educational and informational film and video distributors are now licensing their works for "the life of the tape or film" or for other periods of time. You need to thoroughly familiarize yourself with the terms and conditions imposed by a distributor in this area.

DEFINITION OF PUBLIC PERFORMANCE

The fourth right of the copyright owner, the right to publicly perform its copyrighted work, is today one of the most critical to be aware of and to understand. To "perform" a work is to exhibit it by means of whatever technology it is designed for. The showing of a film by means of a projector or videocassette player constitutes a performance. Now the question arises as to what constitutes a public performance. The definition of public performance found in the copyright laws does not mirror the ordinary dictionary definition. The copyright law defines a public performance as follows: "to perform it (a work) at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."

In the Erie BOCES case it was judicially determined that a classroom is one location which constitutes a place where a use of a video program would constitute a public performance. Therefore, under normal circumstances, a public performance license would be necessary for the lawful use of a video in a classroom. Normally, when you purchase a film or video from a traditional educational distributor, the sale price includes public performance rights. Another part of the definition of public performance states: "To perform a work publicly is to transmit or otherwise communicate a performance of the work to the public." It is this section of the law which gives the copyright owner the right to license the broadcast of cablecast of its work.

It should be emphasized that not only is the classroom a place where a use will constitute a public performance, but also such will be the case in a school library, a public library and most other locations within a school or college.

Because of the dramatic developments in technology, the public performance right is extremely important to copyright owners, and one which, if violated, could result in litigation. You should exercise caution in this area, and when in doubt, you are well advised to seek professional advice.

FAIR USE

Fair use, found in Section 107 of the copyright law is perhaps well known, at least by name, to many. It is also one of the most maligned areas of the law because of its important, yet vague, language.

We shall now review the statutory language and then apply further explanations to make it more easily understood. Section 107 reads as follows:

> Notwithstanding the provisions of Section 106 (sole rights of copyright owners) the fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:
>
> > the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> > the nature of the copyrighted work;
> > the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and,
> > the effect of the use upon the potential market for or value of the copyrighted work.

When you consider how important this area of the law is to the educational community in particular, it is surprising how brief the language is. Indeed, many would prefer a much more detailed account of what is and what is not fair use. It is the feeling of many authorities in the field that all interests are better served by this vagueness so as to allow an everdeveloping concept which will fit the needs of society at any particular point in time. If fair use were to be precisely defined now, courts would be forced to apply the intent of Congress without much opportunity for interpretation. Obviously such is not the case now, and interpretation can be made without statutory amendment.

Let's review the requirements. Remember, all four requirements must be satisfied in order for a use to be considered a fair use. The first requirement is intended to differentiate commercial uses and noncommercial, educational uses. In the first point, fair use will be applied more often in the

case of noncommercial, educational uses and this area should not give you any difficulty.

The second requirement is that you consider the nature of the copyrighted work. To do this, let's compare the differences between a text book and a film or video program. In the case of the book, it is designed to be used by each student individually. On the other hand, the videotape you use is designed for public performances, and the entire intended audience will view it simultaneously so that only a single copy or a very few number of copies will fill your needs. It becomes rather apparent that the comparatively limited market for the videotape mandates that the fair use doctrine be more restrictively applied in the case of the videotape than in the case of the text book. Although it is true that the videotape or film may be more expensive than the text book, only part of the price differential is due to the limited market.

The third requirement of fair use is the so-called quantitative test. In other words, how much of the whole program are you using? Generally speaking, the less of a work you use the greater would be the likelihood of it being a fair use. But we must examine the language from the law again, and as you will note, the criteria is not only how much is used but also the substantiality of the portion used in relation to the work as a whole. As mentioned in the copyright video, if you use the very essence of the work in spite of it length, there is a good chance it will not be fair use. The emergence of a butterfly from its cocoon filmed by means of expensive and rare time-lapse photography may only run a few minutes, but may be the very essence of the entire work. In this example, fair use would not apply, even in a noncommercial educational setting.

The fourth and last of the fair use requirements is "the effect of the use upon the potential market for or value of the copyrighted work." What this means is that for a use to be a fair use it must not damage either the present or future market for the work. The Senate Report accompanying the copyright law (Report No. 94-473) says, in its comments on fair use, "With certain special exceptions, a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." Some educators have advanced the argument that if a school district does not have the funds to purchase a film or video, copying it does not constitute an infringement because the copyright owner did not lose a sale. This argument is certainly invalid from a legal point of new, and indicates a misunderstanding of the law.

Any discussion of fair use must include the GUIDELINES FOR OFF-AIR RECORDING OR BROADCAST PROGRAMMING FOR EDUCATIONAL PURPOSES. These guidelines were developed by a committee of individuals who represented almost every conceivable interest group involved in the production and dissemination of audiovisual materials. The genesis of this committee went back to the last days prior to the passage of the copyright law. As off-air videotaping by teachers and media directors became increasingly popular in the mid-70's, educators and producers attempted to develop some ground rules which would be adopted by the Congress for classroom duplication of literary works. However, the issue was raised too late for Congressional action. Congressman Robert Kastenmeier of Wisconsin, the principal architect of the copyright law, who still chairs the House sub-committee having jurisdiction over copyright, wrote the following in the House Report (94-1476): "The problem of off-air taping for non-profit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved difficult to resolve. The committee believes that the fair doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress."

Although a national meeting under the joint sponsorship of the Copyright Office and the Ford Foundation held at Airlie, Virginia in 1977 did not result in any immediate action, in 1979, at the urging of the Register of Copyrights, Barbara Ringer, Congressman Kastenmeier did appoint a committee whose charge was to develop a set of fair use guidelines in order to lend some substance to and definition in this area.

It took the committee nearly two years to develop these guidelines. They represent a workable compromise and although not everyone has endorsed them, nearly everyone agrees that the guidelines are as liberal an interpretation of the copyright law as has been allowed in this area. For your convenience, the entire wording of these guidelines appears below. A discussion of the most important features follows immediately afterwards.

GUIDELINES FOR OFF-AIR RECORDING OF BROADCAST PROGRAMMING FOR EDUCATIONAL PURPOSES

1. The guidelines were developed to apply only to off-air recording by non profit educational institutions.

2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmission) and retained by a non-profit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.

3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary , in classrooms and similar places devoted to instruction within a single building, cluster or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) calendar day retention period. "School Days" are school session days-not counting weekends, holidays, vacations, examination periods, or other scheduled interruptions-within the forty-five (45) calendar day retention period.

4. Off-air recordings may be made only at the request of and used by individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.

5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

6. After the first ten (10) consecutive school days, off-air recordings may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e. to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.

7. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

8. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.

9. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

Most of the requirements are straightforward and clear but a few comments are in order. The guidelines are meant to apply only to "broadcast programs" which are television programs transmitted by television stations for reception by the general

public without charge. This excludes many cable transmissions, including the premium feature film services. The guidelines state that a tape can be made only at the request of an individual teacher and not in anticipation of teacher needs. Tapes made under the guidelines can be retained up to 45 calendar days following the date of the recording, but may be used in a classroom only once during the first 10 consecutive school days following the date of recording. No program may be recorded more than once at the request of the same teacher no matter how many times the program may be broadcast. Most importantly, at the end of the first 10 consecutive school days, the off-air recording can be used only for evaluation purposes in order to determine if a long term license will be sought. Teacher use of these off-air recordings is restricted to classrooms and similar places devoted to instruction. If a teacher feels a legitimate need of a second use within the 10 day period for instructional reinforcement,the guidelines do permit it.

The guidelines are silent on the point as to where a tape can be made, but most authorities in the field agree that a tape could be made outside of the institution, for example in the home, provided that the request to tape is made by a teacher to some school authority and further provided that such a tape be used in strict accordance with the guidelines. In other words, a tape made at home under the guidelines enjoys no greater privilege than if it were made at the school. It is critical to keep this firmly in mind because some people tend to confuse the restrictions of the guidelines with the home taping privileges given by virtue of the decision by the United States Supreme Court in Universal City Studios vs Sony Corporation of America (104 S. Ct. 774,1984). In that decision, the Supreme Court declared that the copyright laws do not prohibit off-air recordings by individuals for their personal use in their homes. The decision does not permit the use of these tapes outside of the home, particularly in circumstances which would involve a public performance of the tape. As you can readily imagine, the opportunity for abuse is great if you permit taping to be done at home. Therefore, it is strongly urged that you develop controls, which should include the logging in of all such tapes, the placement of labels on the tapes which indicate the date of recording and the date of erasure, and the classroom viewing restrictions.

Fair use is often difficult to explain without the use of hypothetical or real fact situations. Rather than expose yourself or your institution to possible infringements, you are advised to seek clarification and advice from your supervisor.

FACE-TO-FACE EXEMPTION

We previously reviewed the sole rights of the owner of a copyright followed by one of the exemptions, fair use. We will now direct our attention to another exception, this regarding the sole right to authorize public performances. This area is generally referred to as the face-to-face teaching exemption. It is found in Section 110(1) of the copyright law, and although the provisions of it are important for classroom teachers, it is rather limited in scope and therefore, a discussion of what it is and what it is not, is important.

Let us first review the actual language of the statute. It reads as follows. "Notwithstanding the provisions of Section 106, the following are not infringements of copyright: (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a non profit educational institution, in a classroom or similar place devoted to instruction, unless in the case of a motion picture or other audiovisual work the performance is given by means of a copy that was not lawfully made and that the person responsible for the performance knew or had reason to believe was not lawfully made."

The best manner in which these requirements can be explained is to break up the wording from Section 110(1) into its logical parts. Please bear in mind that this section is only relevant in those instances where a classroom performance is planned of a film or video which has not been cleared for public performance.

Now then, the first requirement is that the performance be given by an instructor or pupil, thus ruling out presentation by a guest lecturer. Secondly, the performance must involve a face-to-face teaching activity. This means that the material being performed and the teacher and students must be together, although most authorities seem to agree that a use involving a closed circuit television system confined to one building could be utilized. But there is no doubt that the intent was to exclude performances otherwise transmitted into the classroom such as district-wide closed circuit transmission. The next requirement is that the use must be limited to teaching activities which rules out use for recreational purposes, entertainment or rewards to the members of the class. The language from the House Report uses the phrase "systematic instruction". The next requirement is that the performance take place at a non-profit educational institution.

A crucial requirement is that the performance takes place in a classroom or similar place devoted to instruction. It is this portion of the language which seems to cause most of the confusion. Although it is true that this requirement does not limit the locale to what we normally think of as a classroom, on the other hand it does have its own set of limitations. A teacher may conduct his or her class in the boiler room of the school but that does not make the boiler room a classroom except at that time. Similarly, a teacher may take his or her class to the library, and conduct a session there, and while so doing the library would qualify under the language of this section as a place where the performance of a film or video is lawful. But that event does not make the library a classroom in terms of fulfilling the requirements of Section 110(1) of the copyright law. On the other hand, if a teacher sends a student to the library in order to view a video he missed the previous day, the library is not then functioning as a classroom and there is no face-to-face teaching going on.

Remember, the language states that the performance must take place in a classroom or similar place devoted to instruction. A library is not a place normally devoted to instruction although in the example used earlier, a strong argument can be made in favor of it becoming a classroom when students and their teacher gather together for instructional purposes.

The final requirement of Section 110(1) is that the performance must be given by means of a lawfully made copy, or that the person responsible for the performance had no reason to believe it was not lawfully made. Who the person is that is "responsible" for the performance will be determined by the facts in each instance. Again, please bear in mind that the importance of this public performance exemption only occurs when you are planning to use a program for classroom teaching which has not been cleared for public performances. As a practical matter, this most often occurs when you purchase or rent a videotape copy of a program from a home video outlet. Such tapes normally have a warning notice on them stating that they are intended for home use only. In such event, if all the requirements we have just reviewed of Section 110(1) are complied with, a public performance license is not necessary. A word of caution here is important. Many video dealers are requesting patrons to agree to certain terms and conditions at the time of the transaction which actually constitutes a contractual relationship between the parties. In some instances the dealer is requesting that the renter or purchaser sign such an agreement indicating that the tape will be used for home viewing only. In such cases, the contractual obligation supersedes any rights you might have under the copyright law.

Therefore, you are well advised to check very carefully any document which a video dealer requests that you sign. All things considered, you are much better off using programs which have been cleared for public performances, because then there is no question as to where and when you can perform that program, whether it's a library or classroom, or whether it is for instructional purposes or otherwise. The only right which you normally must obtain separately (when acquiring a video through normal channels) is the right to be able to transmit the program.

TELEVISION RIGHTS

As a general rule, most distributors can grant you some television rights, unless prevented by contractual limitations placed on them by the producers. Sometimes television rights cannot be granted to you because the rights have not been

cleared with the performers, directors, and the like, and the clearances would be prohibitively expensive. In other instances, television rights may not be available because the program was obtained from a broadcaster who wants to retain all future broadcast rights. However, the development of cable television and closed circuit systems as educational tools have made it possible to obtain some limited transmission rights even though traditional broadcast rights may not be available. A distributor will require details from you as to what type of a system you are using, the size of your audience and other pertinent information. This will enable the distributor to determine if it possesses the rights you want and the license fee. Since not all distributors base their fees on the same criteria, the information you may have to supply might vary. But one thing remains true in each and every case...it is illegal and a copyright infringement if you transmit a program without permission from either the copyright owner or his/her authorized distributor. Transmitting a program without permission is terribly risky. There is no better way to "announce" an illegal act than to put it on television without having obtained a proper license. When in doubt, always contact your distributor to ascertain the limitations of these or any other rights.

CONCLUSION

It is hoped by all of those responsible for the creation of our copyright video and this viewer guide that the information which has been provided to you is helpful and informative. Those of us who have spent most of our adult lives in the educational business in one capacity or another have witnessed dramatic changes of all kinds. Probably the two most significant changes are the development and availability of video recorders and the passage of the present set of copyright laws. The present law was intended to meet the needs and challenges brought about by technology in order to serve better both creators and users of intellectual properties. The prior law dated back to 1909 with hardly any significant modifications from that year until 1976.

Technology now makes it possible, through the creation of the VCR, for each of us to act as a video laboratory. New transmission systems, satellite delivery and cable television all have their place in improving access. But one thing should remain clear- if we forget about the copyright interest of the creator, this technology may result in diminishing the number of individuals or corporations who will devote their time, money and energy to create the one ingredient upon which technology is built...the need to have something to perform. The copyright laws are not perfect, nor could they be expected to be. They do, however, represent a decent compromise between the interests of users and creators. It is now our task to learn what the law requires, what rights it gives to each party and to take steps to see to it that the laws are applied professionally and responsibly, no matter which interest we may represent.

COPYRIGHT LAW: WHAT EVERY SCHOOL, COLLEGE AND PUBLIC LIBRARY SHOULD KNOW

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